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No. 84-1851

In the Supreme Court of the United States

OCTOBER TERM, 1985

EDGAR HARDIN GILLOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that the misjoinder of three counts of the indictment was harmless error and therefore did not require reversal of petitioner's convictions.

2. Whether the evidence was sufficient to support petitioner's convictions for mail fraud, wire fraud, and extortion.

3. Whether evidence was properly admitted at trial under the co-conspirator exception to the hearsay rule.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 752 F.2d 1116.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1985. A petition for rehearing was denied on March 1, 1985 (Pet. App. 21-22). On April 22, 1985, Justice O'Connor extended the time for filing a petition for a writ of certiorari to May 30, 1985, and the petition was filed on May 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted on six counts of mail fraud, in violation of 18 U.S.C. 1341, two counts of wire fraud, in violation of 18 U.S.C.

1343, one count of extortion, in violation of 18 U.S.C. 1951, one count of tax evasion, in violation of 26 U.S.C. 7201, and one count of conspiracy, in violation of 18 U.S.C. 371. Petitioner was acquitted on three counts of making false tax returns, in violation of 26 U.S.C. 7206, and a mistrial was declared with respect to six counts charging him with extortion. He was fined $10,000 and sentenced to concurrent terms of four years' imprisonment on the fraud, extortion, and conspiracy counts and a consecutive three-year term on the tax evasion count. The court of appeals affirmed except with respect to one of the wire fraud counts and the conspiracy count (Pet. App. 1-20).[1]

1. The evidence at trial showed that petitioner, a former Tennessee state senator, used his influence to assist in the sale of Honeywell computers to state and local governments in exchange for payments in excess of $150,000. Oliver Drew and Jack Owen, two Honeywell employees, approached petitioner in 1975, seeking his assistance in their efforts to sell a Honeywell computer to the Tennessee Department of Employment Security. After the Department announced plans to purchase the computer, petitioner asked Owen for compensation. Owen replied that Honeywell had a policy of prohibiting payments to public officials, but he contrived a scheme to pay petitioner $4,000 indirectly through a consulting firm. Pet. App. 1-2.

In 1976, co-defendants Allan Bibby and A. Arthur Ayers, Honeywell executives, devised a plan to defraud the company by obtaining kickbacks from several sales of Honeywell computers financed by Financial Marketing Services,

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[1]Co-defendants Allan Bibby and A. Arthur Ayers were convicted on the conspiracy, mail fraud, and wire fraud counts. The court of appeals affirmed their convictions except with respect to one of the wire fraud counts. Bibby has sought review by this Court. *Bibby* v. *United States*, No. 84-1692.

Inc., which was owned by Jack Camarda, a former Honeywell employee. As a result of this scheme, Bibby and Ayers each received $600,000 from Camarda out of the proceeds of 12 computer sales over the course of four years. In order to conceal the payments from Honeywell, they were funnelled through a cattle ranching operation. Pet. App. 2-3.

One of the sales involving kickbacks was to Shelby County, Tennessee. Petitioner agreed with his co-defendants and Camarda to use his influence to convince the county to purchase an upgraded Honeywell computer system. They paid him $3,000 per month for six months as a retainer and $130,000 as a commission after the sale was finalized. The commission was paid to a company operated by a friend of petitioner's, who then used the money to pay some of petitioner's bills. Petitioner never reported the commission as taxable income. Pet. App. 3-4.

2. The court of appeals concluded that three counts charging petitioner with tax fraud in connection with unrelated deductions for attorney's fees were improperly joined under Fed. R. Crim. P. 8 with the counts relating to the Honeywell transactions (Pet. App. 5-7). The court concluded, however, that the misjoinder was harmless error in view of petitioner's acquittal on the misjoined counts, the relatively insignificant attention devoted to them at trial, and the discrete nature of the misjoined offenses (*id.* at 7-9).

The court of appeals reversed petitioner's conspiracy conviction on the ground that he was not part of the central conspiracy between his co-defendants and Camarda to split the profits from a series of computer sales, but rather was involved only in a conspiracy with respect to the Shelby County sale (Pet. App. 11-12). Notwithstanding the proof of multiple conspiracies, the court of appeals concluded that the record adequately supported the admission of co-conspirator statements under Fed. R. Evid. 801(d)(2)(E) (Pet. App. 12-13).

Finally, the court of appeals ruled that, with the exception of one wire fraud count, the evidence was sufficient to sustain petitioner's convictions for mail fraud, wire fraud, and extortion.[2] As to the fraud counts, the court reasoned that Honeywell had been defrauded by the defendants' receipt of kickbacks and that petitioner was aware that he was not entitled to the funds that he received (Pet. App. 15-17). With respect to the extortion count, the court concluded that petitioner violated the Hobbs Act (18 U.S.C. 1951) by receiving money in exchange for his promise to use his influence as a state official to assist in closing the sale with Shelby County (Pet. App. 18-19).

ARGUMENT

1. Petitioner contends first (Pet. 25-40) that his convictions should be reversed on the basis of misjoinder.

a. Referring to the misjoined tax offenses, petitioner argues (Pet. 25-27, 33-40) that misjoinder may never be considered harmless error. This question is identical to that presented in *United States* v. *Lane*, cert. granted, No. 84-744 (Feb. 19, 1985). Accordingly, the petition should be held with respect to this question pending the Court's decision in *Lane*, and then disposed of as appropriate in light of that decision.[3]

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[2]The court of appeals reversed the one wire fraud count because the government had not proven what was said during the phone call that formed the basis for that count (Pet. App. 17).

[3]We have recommended the same course with respect to the petition filed by co-defendant Bibby (No. 84-1692).

To the extent that petitioner is also arguing that even if misjoinder may constitute harmless error, the court of appeals erred in concluding that the error was harmless here, that factbound contention obviously does not merit review by this Court. Especially in view of petitioner's acquittal on the misjoined counts and their minor role at trial, he could not have been harmed by their presence in the case. See Pet. App. 7-9.

b. Petitioner also contends (Pet. 28-33) that he was prejudicially misjoined with his co-defendants in light of the reversal of his conspiracy conviction. This argument lacks merit. It is well settled that, at least in the absence of bad faith (which is not alleged here), dismissal of a conspiracy count does not retroactively invalidate the initial joinder under Fed. R. Crim. P. 8(b). *Schaffer* v. *United States*, 362 U.S. 511, 513-517 (1960). Moreover, even without the conspiracy count, the joinder of all defendants plainly was proper here, as they had "participated * * * in the same series of acts or transactions constituting an offense or offenses" under Rule 8(b). In particular, all of the defendants were charged and convicted on the same mail and wire fraud counts. Accordingly, there was no misjoinder apart from the tax counts involving attorneys' fees.

2. Relying on *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979), petitioner argues next (Pet. 40-52) that the evidence was insufficient to support his convictions for fraud and extortion. The court of appeals correctly rejected this claim.

a. The defendant in *Rabbitt* was a Missouri state legislator. In return for a fee, he introduced an architectural firm to persons who might have been able to secure governmental construction contracts for the firm (583 F.2d at 1020-1021). His prosecution for mail fraud rested on the theory that he had defrauded the citizens of Missouri (*id.* at 1024-1025). The court of appeals reversed the mail fraud convictions because there was no evidence that the defendant's conduct had injured the public or affected the performance of his duties (*id.* at 1026).

Here, by contrast, petitioner was charged with defrauding Honeywell, not the citizens of Tennessee. The court of appeals correctly found (Pet. 15-17) that Honeywell had in fact been injured by petitioner's fraud because petitioner's

receipt of kickbacks violated the company's policy against payments to public officials and because the company was deprived of the loyal and faithful services of its employees.[4] No monetary loss is required, although in fact the kickbacks here by their nature prevented Honeywell from receiving a higher profit or offering a lower price (which may have helped it to obtain business in the future). The courts of appeals have uniformly held that the mail fraud statute extends to breaches of duty similar to that involved in this case, and this Court has consistently declined to review those decisions.[5] There is no reason for a different result here.

b. Nor is petitioner's extortion conviction inconsistent with *United States* v. *Rabbitt, supra.* Under the Hobbs Act, it is illegal to "obtain[] * * * property from another, with his consent, * * * under color of official right" (18 U.S.C. 1951(b)(2)). In *Rabbitt*, the court of appeals applied

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[4]Petitioner's clandestine receipt of the kickbacks (see Pet. 16-17) negates any claim of ignorance of the company's policy on his part.

[5]See, *e.g., United States* v. *Venneri*, 736 F.2d 995 (4th Cir. 1984), cert. denied, No. 84-266 (Nov. 26, 1984); *United States* v. *Feldman*, 711 F.2d 758, 763 (7th Cir.), cert. denied, 464 U.S. 939 (1983); *United States* v. *Bronston*, 658 F.2d 920, 926-927 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982); *United States* v. *Shamy*, 656 F.2d 951, 957 (4th Cir. 1981), cert. denied, 455 U.S. 939 (1982); *United States* v. *Barta*, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States* v. *Mandel*, 591 F.2d 1347, 1361-1364, vacated on other grounds, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); *United States* v. *Castor*, 558 F.2d 379, 383 (7th Cir. 1977), cert. denied, 434 U.S. 1010 (1978); *United States* v. *Bush*, 522 F.2d 641, 646-648 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); *United States* v. *Keane*, 522 F.2d 534, 544-546 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976); *United States* v. *Bryza*, 522 F.2d 414 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States* v. *States*, 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974); *United States* v. *George*, 477 F.2d 508 (7th Cir.), cert. denied, 414 U.S. 827 (1973).

(583 F.2d at 1027) the established rule that a public official violates the Hobbs Act by receiving payments in connection with the performance of an official function even where "[t]he official [does] not control the function in question," so long as "the extorted party possesses a reasonable belief in the official's powers." However, no such belief was proven in that case (*id.* at 1028). Here, on the other hand, the court of appeals, applying the same rule, expressly found (Pet. App. 19) that petitioner's "past performance on the State of Tennessee contract, combined with his assurances to Oliver Drew that he had 'influence in Shelby County,' were sufficient to create a reasonable belief that he could deliver the goods." This was plainly sufficient to violate the statute. See, *e.g.*, *United States* v. *Rindone*, 631 F.2d 491, 495 (7th Cir. 1980); *United States* v. *Mazzei*, 521 F.2d 639, 643 (3d Cir.) (en banc), cert. denied, 423 U.S. 1014 (1975).

3. Finally, petitioner argues (Pet. 52-62) that the admission of certain co-conspirator statements under Fed. R. Evid. 801(d)(2)(E) was erroneous because the district court incorrectly assumed that only one conspiracy had been proven at trial. The court of appeals, however, took note of this problem and concluded (Pet. App. 13), after reviewing the record, that the evidence was properly admitted even though multiple conspiracies had existed. This factbound conclusion obviously does not warrant review by this Court.

CONCLUSION

The petition should be held with respect to Question 1 pending the Court's decision in *United States* v. *Lane*, No. 84-744, and then disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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